

## MEMORANDUM

TO: Montana State Legislature Energy and Telecommunication Committee  
FROM: Montana Public Service Commission  
DATE: July 2, 2020  
SUBJECT: Potential 2021 Legislative Action Items

### PURPOSE

The Public Service Commission (“Commission”) requests the Energy and Telecommunications Committee (“ETIC”) to consider two bills for the 2021 Legislative Session. The first is a bill to amend language in Mont. Code Ann. § 69-3-331 (SB 244 in the 2019 Legislative Session), to clarify that the statute only applies to electricity supply cost-tracking mechanisms and to remove the “identical” treatment language, which is difficult to implement. The second is a bill to repeal Mont. Code Ann. §§ 69-3-401 through -405, as these statutes are redundant and antiquated.

#### Amend Mont. Code Ann. § 69-3-331

The 2019 legislature enacted Senator Blasdel’s Senate Bill 244, which required that cost-tracking adjustments, if approved by the Commission, must include identical treatment of public utilities, 90/10 sharing of costs if cost sharing is required, and full recovery of costs incurred as a result of qualifying small power production facility purchase requirements. The bill was codified as Mont. Code Ann. § 69-3-331.

The Commission found that SB244, as written, is difficult to implement. The Commission requested comments from stakeholders, and found that none of the utilities supported strict identical treatment. For example, MDU’s electricity supply tracker adjusts monthly based on four months of historical data, while NorthWestern’s is updated annually (prior to the annual true-ups, it too had monthly adjustments, however those adjustments were based on a rolling 12-month average). While some utilities agreed that the law, as written, could be applied to all cost-tracking adjustments, all agreed that it should only be applied to electricity supply cost-tracking adjustments.

The Commission recommends the following draft language, which makes the statute specific to electricity supply cost-tracking adjustments and removes the requirement for “identical” treatment of utilities.

AN ACT REVISING SECTION 69-3-331, MCA,

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

**Section 1.** Section 69-3-331, MCA, is amended as follows:

**69-3-331. Cost tracking and recovery.** (1) If the commission approves a cost-tracking adjustment for electricity supply costs for a public utility regulated in accordance with chapter 8 or under this chapter, the cost-tracking adjustment must provide for:

~~(a) identical treatment of public utilities subject to chapter 8 or this chapter;~~

~~(b)~~(a) 90% customer and 10% shareholder sharing of costs, if cost sharing is required; and

~~(c)~~(b) full recovery of costs incurred by a public utility as a result of qualifying small power production facility purchase requirements established in Title 69, chapter 3, part 6.

(2) A cost-tracking adjustment may not include a deadband.

(3) For the purposes of this section, "deadband" means a level of cost recovery variance, including levels of underrecoveries and overrecoveries to be borne by the public utility.

**Section 2. Effective date.** This Act is effective on passage and approval.

Repeal Mont. Code Ann. §§ 69-3-401 through -405

There are two mechanisms for judicial review of Commission final decisions, one available under Mont. Code Ann. §§ 69-3-401 through 69-3-405, and the other available under Montana's Administrative Procedures Act in Mont. Code Ann. §§ 2-4-701 through 2-4-711. There are two review mechanisms because the Commission's Title 69 judicial review procedures predate MAPA by close to 60 years; our procedures were enacted in 1913, while MAPA was more recently enacted in 1971. After MAPA was enacted, even though the purpose of the Act was to "establish general uniformity and due process safeguards" in agency proceedings, and "establish standards for judicial review of agency rules and final agency decisions", Mont. Code Ann. § 2-4-101, for whatever reason the Commission's judicial review procedures have remained law since 1971.

The two mechanisms are substantially similar, except for one important distinction, and the Commission and parties seeking judicial review typically rely on only the MAPA provisions:

- **Effective Date of Commission Orders.** Mont. Code Ann. § 69-3-401 states that Commission orders are operative within 20 days after they are filed with the Commission. In contrast Mont. Code Ann. § 2-4-623(6) requires agency orders to become operative as soon as they have “been made available for public inspection.” This results in a conflict between the two effective dates. The Commission is not aware of any petitions for judicial review relying on Mont. Code Ann. § 69-3-401.
- **Injunctive Relief.** Mont. Code Ann. § 69-3-403 describes the process for parties to seek a stay of Commission final decisions pending judicial review. This process is similar to a preliminary injunction also available to parties under Title 27, however MAPA has a specific process and mechanism available to parties to request a stay of Commission decisions pending review (Mont. Code Ann. § 2-4-702(3)). This provision is more relevant, and the Commission is not aware of any petitions for judicial review relying on Mont. Code Ann. § 69-3-403, while all stay requests have utilized Mont. Code Ann. § 2-4-702(3). One distinction that bears mentioning is that Mont. Code Ann. § 69-3-403(2) does require parties to post a bond prior to an injunction being granted. There is no similar MAPA provision, however this provision is contemplated in Title 27 injunction statutes and under Montana Rule of Civil Procedure 62.
- **Review confined to record.** Mont. Code Ann. § 69-3-404 has several functions: (1) ensures review is confined to the record, and requires a bench review; (2) allows for parties to supplement the record if there are cases of alleged irregularities, or if additional evidence is needed; and (3) includes a contingency in case the Commission’s final decision is modified while in judicial review. Generally these provisions are mirrored, and improved upon, by MAPA: (1) Mont. Code Ann. § 2-4-704(1) confines review to the record, requires a bench review, while Mont. Code Ann. § 2-4-614 further describes what is included in the record; and (2) Mont. Code Ann. § 2-4-704(1) allows parties to supplement the record in cases of alleged procedural irregularities, and Mont. Code Ann. § 2-4-703 allows the Court to receive additional evidence if needed. However, there is no contingency provided for in MAPA similar to Mont. Code Ann. § 69-3-404(4). The Commission is unaware of this contingency provision being utilized in Commission reviews.
- **Appeal of Court Decision.** Mont. Code Ann. § 69-3-405 establishes the timeline for appealing a district court’s decision on a petition for judicial review (60 days).

MAPA mirrors this requirement, however it improves upon the Title 69 provision by also explaining how Commission decisions shall operate while being appealed. Mont. Code Ann. § 2-4-711. The Commission is unaware of the Title 69 provision being relied upon by parties in a review of recent petitions for judicial review.

- Action to Challenge Commission Order. Mont. Code Ann. § 69-3-402. This statute has several functions: (1) established the timing for parties to seek judicial review (30 days from effective date of a Commission Order); (2) establishes a standard of review (unlawful or unreasonable); (3) requires the Commission and other parties to file an answer within 20 days; (4) requires priority of Commission judicial reviews over other civil causes; (5) places a burden of proof on the party seeking judicial review.

Except for one important difference, these functions are duplicated and improved upon by MAPA. Mont. Code Ann. § 2-4-702(2)(a) includes the similar 30 day timeline for parties to seek judicial review, and in general provides a more comprehensive statutory framework for judicial review, while Mont. Code Ann. § 2-4-704 requires a more exhaustive, and detailed, standard of review.

The one important difference, and one of the purposes of this legislative action item, is that MAPA does not require the 20 day answer deadline in Mont. Code Ann. § 69-3-402(2). This answer deadline is seldom utilized in judicial review petitions. To the point, in a review of Commission records over the past two decades, the Commission could only determine three cases where the 20 day answer deadline was ever operative, and two of those cases are within the past three years, while the other was addressed by a *pro se* litigant.

This deadline is problematic and has been utilized, at least in the two most recent Petitions where it was relied upon, to the Commission's detriment. The first case involved the propane utility ABACO, while the second involves Northern Telephone Cooperative. This Commission will remember that when ABACO first sought judicial review of the Commission's final decision exercising jurisdiction over ABACO, that we engaged in good-faith discussions with ABACO prior to beginning briefing on their Petition for approximately a year or more. However after ABACO failed to file its rate case with the Commission, and after the Commission initiated a lawsuit for violation of Commission Orders, ABACO moved for entry of default for the Commission's failure to respond to the petition within 20 days under Mont. Code Ann. § 69-3-402(2). In some instances an entry of default is an administrative function issued by the Clerk of Court, which is what occurred in the ABACO case. Accordingly, even though the Commission and ABACO had been

engaged in good-faith discussions, the Clerk granted ABACO's entry of default. Although the Commission eventually was successful in having the entry of default set aside, and the case has since been dismissed, and ABACO now plans to file its rate case with the Commission in the near future, the endeavor utilized scarce Commission resources and only served to delay and stall a substantive decision on the merits.

The second case involves Northern Telephone Cooperative. Northern has moved for entry of default for failure to respond within 20 days, even though Northern's own petition required a 42-day response deadline of the Commission. The Commission has opposed this motion and is currently engaged in briefing on this issue and a related motion to dismiss Northern's petition, so that the Commission's underlying investigation can proceed.

Regardless of the merits of either lawsuit, the 20-day answer deadline has resulted in the Commission legal division spending more resources to either (1) if warranted, after parties agree that the 20-day deadline does not apply to their respective PJR, we then file a stipulation with the Court to ensure the Commission is not in danger of default; or (2) litigating to either prevent or remove an entry of default if sought by parties after the 20-day deadline has passed. In either scenario, this mechanism has resulted into a waste of Commission resources that prevents effective review of Commission decisions on the merits.

Mont. Code Ann. § 69-3-402(2) is an antiquated procedural provision that should be removed from law. Of note, this statute is also not tailored to modern judicial review processes, as it contemplates a civil pleading procedure, i.e., a complaint and an answer. This process is poorly suited for review of agency decisions where there is already a contested evidentiary record and final commission decision to review. Under these circumstances, there is no need to plead and answer as what is required by Mont. Code Ann. § 69-3-402(2).

The Commission recommends the following draft bill language to address the judicial review redundancies.

*Bill Draft Language for Mont. Code Ann. §§ 69-3-401 through -405 Repeal*

AN ACT REPEALING THE COMMISSION'S TITLE 69 JUDICIAL REVIEW PROCEDURES, SECTIONS 69-3-401 THROUGH -405, MCA,

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

**Section 1. Repealer.** The following sections of the Montana Code Annotated are repealed:

- 69-3-401. Effective date of commission orders.
- 69-3-402. Action to challenge commission order.
- 69-3-403. Injunctive relief.
- 69-3-404. Review confined to record—exceptions.
- 69-3-405. Appeal of court decision.

**Section 2.** Section 69-3-308 is amended to read:

**“Disclosure of taxes and fees paid by customers of public utility—automatic rate adjustment and tracking for taxes and fees.**

(1) A public utility may separately disclose in a customer's bill the amount of state and local taxes and fees assessed against the public utility that the customer is paying.

(2) (a) (i) [Except as provided in 15-72-601,] the commission shall allow a public utility to file rate schedules containing provisions for the automatic adjustment and tracking of Montana state and local taxes and fees, except state income tax, paid by the public utility. The resulting rate schedule changes must include:

(A) adjustments for the net change in federal and state income tax liability caused by the deductibility of state and local taxes and fees;

(B) retroactive tax adjustments; and

(C) adjustments related to the resolution of property taxes paid under protest.

(ii) The rate schedules must include provisions for annual rate adjustments, including both tax increases and decreases.

(b) The amended rates must automatically go into effect on January 1 following the date of change in taxes paid on an interim basis, subject to any adjustments determined in subsection (2)(c).

(c) The amended rate schedule must be filed with the commission on or

before the effective date of the change in taxes paid, and if the commission determines that the revised rate schedule is in error, the commission may, within 45 days of receipt of the revised rate schedule, ask for comment and order the public utility to address any errors or omissions including, if necessary, any refunds due customers.

(d) Failure of the commission to issue an order pursuant to subsection (2)(c) is considered approval on the part of the commission.

(e) A public utility may challenge an order issued by the commission under subsection (2)(c) in accordance with the provisions of 2-7-401 through 2-4-71169-3-401 through 69-3-405.

**Section 3. Effective date.** This Act is effective on passage and approval.

- END -